

Supreme Court, U. S.

FILED

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MICHAEL RODAN, JR., CLERK

**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1976**

No. 76-1695

**JAMES D. ECKMAN, *Petitioner,***

**v**

**UNITED STATES OF AMERICA, *Respondent.***

**PETITION FOR A WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Sixth Circuit**

on the brief:  
R. John Mock  
Youngstown, Ohio

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**PETITION FOR A WRIT OF CERTIORARI  
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\_\_\_\_\_  
The petitioner James D. Eckman respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 3, 1977.

**ORDER BELOW**

The order of the Court of Appeals which was not reported is set forth in an appendix hereto. The order and judgment by the United States District Court for the Northern District of Ohio, Eastern Division pertinent to the questions raised herein is included in the transcript of the plea proceeding and is set forth in the appendix hereto.

## JURISDICTION

The judgment by the court below was entered on May 3, 1977 and this petition for certiorari will be filed on or prior to June 2, 1977. This Court's jurisdiction is invoked under Title 28 United States Code Section 1254(1).

## STATEMENT OF THE ISSUES

1. WHETHER STRICT PROCEDURAL COMPLIANCE IS REQUIRED UNDER THE NEWLY AMENDED RULE 11 FEDERAL RULES OF CRIMINAL PROCEDURE DURING PLEA PROCEEDINGS IN A FEDERAL CRIMINAL CASE AFTER DECEMBER 1, 1975?
2. WHETHER THE ORDER BELOW SO FAR SANCTIONED A DEPARTURE BY THE DISTRICT COURT OF THE MANDATE IN *McCarthy v. United States* 394 U.S. 459 (1969) THE REQUIREMENTS OF WHICH WAS EMPHASIZED BY THE NEW CONGRESSIONAL MANDATE [RULE 11 F.R. Cr. P., DECEMBER 1, 1975]?

## STATUTE AND RULE INVOLVED

United States Code, Title 18:

Section 659 [full text set forth in the appendix appended hereto].

Federal Rules of Criminal Procedure, Title 18, Rule 11, amended eff. Dec. 1, 1975 [full text set forth in the appendix appended hereto].

## STATEMENT OF THE CASE

Petitioner tendered a plea of guilty on February 17, 1976 in the District Court and he was convicted for having possession of a quantity of cigarettes stolen in interstate. Pursuant with a plea bargain a two year custodial sentence was imposed execution of which was suspended and probation was ordered by the trial judge. After a hearing on June 23, 1976 the trial judge revoked probation on the grounds that petitioner was in the company of felons and that he was outside the jurisdiction of the Northern District of Ohio. On the same date a two year custodial sentence was imposed but stayed pending appeal. A timely notice of appeal was filed.

In the court below petitioner claimed, *inter alia*, that where a plea of guilty is tendered under the protection of Rule 11, Federal Rules of Criminal Procedure, it was a clear abuse of discretion and plain error which affected a substantial fundamental right to impose sentence after a conviction was obtained under the influence of a plea bargain without full compliance with the Rule. He contended that after December 1, 1975, full, strict, procedural compliance is required of the Federal Courts under this Court's mandate in *McCarthy v. United States*, 394 U.S. 459 (1969) and under the new congressional mandate.

The court below, having jurisdiction under Title 28 United States Code Section 1291 held that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure.

The record of the plea proceeding shows that counsel for petitioner and the government entered a plea agreement which was spelled out by counsel for the government, the District Judge and approved by petitioner's lawyer. When the District Judge addressed him personally, petitioner said that he was guilty and understood the agreement; that



there were not other promises; that he was present at the place where a shipment of cigarettes was situated and that he had possession of stolen goods. Upon that inquiry, the District Judge accepted the plea bargain and judged petitioner guilty.

### ARGUMENT FOR THE WRIT

#### 1. THE ORDER BELOW RUNS AFOUL OF THE CONGRESSIONAL MANDATE AND THIS COURT'S MANDATE IN *McCARTHY v UNITED STATES*, 394 U.S. 459, AS TO THE CORRECT APPLICATION OF THE PROVISIONS OF RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE AFTER DECEMBER 1, 1975.

In 1973 the court below had occasion to comment on the requirements of *McCarthy v. United States*, *supra*. *Per curiam*, a unanimous panel reasoned that failure to comply *strictly* with Rule 11, would be *per se* prejudicial after *McCarthy*. [our emphasis] See e.g., *Pettigrew v. United States*, 480 F. 2d 681, 683 (6th Cir. 1973). Two years later, a different panel of Judges in the Court below held that there was *substantial* compliance with Rule 11 which was sufficient after *McCarthy*, *supra*; but Circuit Judge McCree dissented, holding that McCarthy is mandatory, e.g., *United States v. Brogan*, 519 F. 2d 28, 30 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 569.

While the McCarthy decision did not canvass plea bargain situations as such, there is ample authority suggesting that the appearance of a plea bargain on the record does not excuse full compliance with Rule 11. Cf. *Santobello v. New York*, 404 U.S. 257 (1971). *A-priori*, the existence of a plea bargain on the record raises the presumption of a coerced plea rather than an affirmative showing of a

free and voluntary waiver of the fundamental protections normally required in the usual course of federal criminal proceedings.

This record is silent; devoid of any suggestion that there was an intentional relinquishment or abandonment of (1) the privilege to resist self-incrimination, (2) the right to confrontation, (3) the right to advice and assistance of counsel at a trial by jury at every stage of the prosecution, all of which is firmly grounded in the Fifth and Sixth Amendments of the Constitution. See e.g., *McCarthy v. United States*, *supra*, 394 U.S. at 466; *cf. Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). Moreover, there is here, an absence of the judicial advice required by Congress under the newly amended Rule 11(c)(d). Presuming waiver of the aforementioned rights, privileges, guarantees and protections from a silent record is impermissible. *id.*, 395 U.S. at 242; *McCarthy v. United States*, 394 U.S. at 466. A-14, 15.

Finally, and most significantly, it is clear that to prove the commission of an offense under the statutory scheme herein, [18 U.S.C. Sec. 659] the government must show that the stolen cigarettes were actually a part of an interstate shipment and that petitioner had knowledge thereof. Petitioner's plaintive response to the District Judge's inquiry, that he was present at the scene and that he possessed stolen property does not fill the gap in the record under this statute. App. Tr. p. 9; *United States v. Untiedt*, 479 F. 2d 1265 (8th Cir. 1973); *United States v. Hilyer*, 543 F. 2d 41 (8th Cir. 1976). See: A-1 [our emphasis]

There was error, plain on the face of the record when the District Judge accepted petitioner's plea without an affirmative showing ON THE RECORD that there was an understanding of the nature of the charge and offense, an intentional relinquishment of known rights, privileges and protections with full knowledge of the con-

sequences of the plea of guilty. When the court below held otherwise, it so far departed from its decisions, the mandate of this Court in *McCarthy*, supra, and the new congressional mandate effective on December 1, 1975 as to call for an exercise of this Court's supervisory power in the circumstances of this case.

## 2. THE ORDER BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER ADMINISTRATION OF RULE 11 FEDERAL RULES OF CRIMINAL PROCEDURE AFTER DECEMBER 1, 1975.

Upon the scant inquiry conducted by the District Judge, he was "satisfied . . . that there is a factual basis for the plea[s] of guilty [which are] voluntarily entered. . . ." A-16. We contend that the order below stands for mere stated compliance by the District Judge which presumes to fill the gap in the record. Such a rule stands in conflict with the strict or substantial compliance rules noted in *Pettigrew v. United States*, 480 F.2d at 683 and *United States v. Brogan*, 519 F. 2d at 30, decisions rendered in the court below prior to the order and judgment rendered in this case.

In *United States v. Journet*, 544 F. 2d 633 (2d Cir. Nov. 1, 1976) the court held that unless the defendant is specifically informed of each and every element enumerated in Rule 11 [eff. Dec. 1, 1975] the plea *must* be vacated. [emphasis ours], *id.*, 544 F. 2d at 634. Circuit Judge Mansfield reasoned for a unanimous panel that the guilty plea amounts to a conviction which may have most serious consequences—as in this case imprisonment—and a hasty or cavalier acceptance is rejected because, *inter alia*, fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless, *id.*, at p. 636. And, in *United States v. Boone*, 543 F. 2d 1090

(4th Cir. Nov. 8, 1976), Circuit Judge Craven held that with respect to the 1975 Rule amendment, prejudice inheres in a failure to comply with Rule 11, because it deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. *id.*, at p. 1092. However, we are constrained to point out that the ON THE RECORD inquiry under the *Journet-Boone* cases might have passed Rule 11 muster prior to December 1, 1975.

Although the ultimate question is always one of the voluntariness, we think the thrust of *McCarthy* has continuing vitality and we should not anticipate its erosion, or undertake to separate inquiries that may be thought more essential from others contained in the command of the rule. *id.*, [543 F. 2d at 1092].

These conflicts justify the grant of certiorari to review the judgment rendered in the court below.

## 3. THE ORDER BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING APPLICATION OF THE NEWLY AMENDED RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE.

The case of *United States v. Olive*, *sub nom*, Eckman, is presently pending in the same District Court on a motion to withdraw plea under Rule 32(d), Federal Rules of Criminal Procedure. See, A-10; A-15, 16. The hearing on the motion was postponed at the government's request to await the order or decision in the instant case from the court below. Will the law [sic] of Eckman apply in the District Court again? Questions concerning the application of the newly amended Rule are presently appearing in this Court. *United States v. Lambros*, 544 F. 2d 962, No. 76-827 [not yet reported] *cert. denied*, March 21, 1977; *Parrish v. United States*, No. 76-1073 and *Pihakis v. United States*, No. 76-1439.



These considerations seem to add further justification for a grant of certiorari to review the order and judgment below.

### CONCLUSION

We respectfully conclude that for the reasons posited herein a writ of certiorari ought to issue to review the judgment and order of the Sixth Circuit in *United States v. Eckman*, No. 76-2314 (May 3, 1977); No. Cr. 75-56 (Dist. Ct. ND ED Ohio, June 23, 1976).

Respectfully submitted,

on the brief:  
R. John Mock  
Youngstown, Ohio

CARMEN A. POLICY  
424 City Centre One  
P.O. Box 837  
Youngstown, Ohio

### CERTIFICATE OF SERVICE

On the date of filing two copies of the Petition and Appendix was mailed postage pre-paid to: Honorable Wade McCree, Solicitor General, United States of America, c/o Department of Justice, Washington, D. C.

CARMEN A. POLICY  
Attorney for Petitioner

## APPENDICES

## APPENDIX A

## United States Code Title 18, Section 659:

*Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or*

*Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or*

*Whoever embezzles, steals or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or*

*Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods or chattels, knowing the same to have been embezzled or stolen—*



Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating

any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

As amended May 24, 1949, c. 139, § 13, 63 Stat. 91; Oct. 14, 1966, Pub.L. 89-654, § 1(a)-(d), 80 Stat. 904.

## APPENDIX B

### Federal Rules of Criminal Procedure:

#### Rule 11. Pleas

(a) **ALTERNATIVES.** A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) **NOLO CONTENDERE.** A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) **ADVICE TO DEFENDANT.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made,



and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) **INSURING THAT THE PLEA IS VOLUNTARY.** The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) **PLEA AGREEMENT PROCEDURE.**

(1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of *nolo contendere*, or an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court *should* not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or *nolo contendere*, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

#### Comment and History of Rule

Rule 11 stood as originally promulgated until 1966, when it was amended to require the court to satisfy itself that a defendant who pleads guilty or *nolo contendere* does so voluntarily and with an understanding of the consequences of the plea. The amendment also required the court to conduct such examinations and inquiries as necessary to be satisfied that a factual basis existed for a plea of guilty.

### APPENDIX C UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee*

v.

JAMES D. ECKMAN,  
*Defendant-Appellant*

No. 76-2314  
Order

Before: PHILLIPS, Chief Judge; ENGEL, Circuit Judge and  
RUBIN, District Judge\*

James D. Eckman pleaded guilty in the district court of a violation of 18 U.S.C. § 659 which charged him with the theft of 730 cases of cigarettes from interstate commerce. The plea followed a negotiated agreement whereby the defendant was given a two-year suspended sentence and five years probation. The government agreed that if the defendant was not involved in any criminal activity for two years, the five year probationary period might be reduced to two years without any opposition to the termination by the government. Before the two-year period had been completed, however, Eckman was found guilty of violation of other terms of his probation. The sentencing judge revoked his probation and imposed the two-year sentence.

In his appeal from the order terminating his probation Eckman charges that his commitment for reasons other than the violation of the prohibition against criminal activity represents a breach of the bargain which he struck with the government at the time of his plea. He, therefore, seeks to have the sentence set aside and the cause

\*The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.



remanded for either enforcement of the alleged agreement or vacation of the plea and trial of the charges against him.

Upon review, the court finds these contentions are without merit. There is no showing that the government violated its agreement or that the sentencing court did not respect its terms. The court further finds that there was no violation of the provisions of Rule 11, Federal Rules of Criminal Procedure. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN

*Clerk*

**Appendix D**

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

RICHARD O. DUSTMAN,  
JAMES DONALD ECKMAN, and  
WILLIAM GEORGE OLIVE,

*Defendants.*

**Criminal Action  
No. CR 75-56-Y**

Proceedings before HONORABLE THOMAS D. LAMBROS  
at 12:00 o'clock P.M., Tuesday, February 17, 1976.

**APPEARANCES:**

On behalf of the Government:  
Mr. William J. Edwards,  
Assistant United States Attorney.

On behalf of Defendant Richard O. Dustman:  
Mr. David R. White and  
Mr. Joseph Saker.

On behalf of Defendant James Donald Eckman:  
Mr. R. John Mock and  
Mr. Carmen Policy.

On behalf of Defendant William George Olive:  
Mr. Gary VanBrocklin.



**TUESDAY, FEBRUARY 17, 1976, 12:00 P.M.**

**THE COURT:** This morning we have on for consideration, on the criminal docket, the case of the United States of America vs. Richard O. Dustman, James Donald Eckman, and William George Olive, being Criminal Docket No. 75-56-Y.

Each of the defendants is charged in a one-count indictment charging violations of Title 18, Section 659 and Section 2 of the United States Code. Each of them is charged with having, on or about the 22nd day of July, 1975, knowingly had in their possession chattels of a value in excess of \$100, namely, numerous cases of cigarettes, which had been stolen while moving and constituting a part of an interstate shipment from Richmond, Virginia to Columbus, Ohio. It is further charged in the indictment that each of the defendants had knowledge that the chattels involved had been stolen.

This crime is punishable in the event of conviction by a maximum fine of \$5,000 and ten years' imprisonment, or both.

This case is scheduled for trial by jury today. The jury has been summoned. The jury is in the jury assembly room ready to be called for the purposes of being impaneled.

Last week an evidentiary hearing was held in these cases. The Court considered the defendants' several motions to suppress evidence and statements and searches.

Upon conclusion of the evidentiary hearing, the Court overruled and denied each of the motions to suppress.

I am now advised by counsel that a change of plea is indicated with respect to each of the defendants.

The record shall reflect that Richard O. Dustman is present in open court together with his lawyers, Mr. David White and Mr. Joseph Saker.

Defendant James Donald Eckman is present in open court together with his lawyers, Mr. John Mock and Mr. Carmen Policy.

Mr. William George Olive is present in open court together with his lawyer, Mr. Gary VanBrocklin.

Mr. William J. Edwards, Assistant United States Attorney, is present for the United States.

Gentlemen, would you present to the Court at this time the position of the respective defendants with respect to possible change of plea.

**MR. MOCK:** Yes, your Honor.

At this time, in behalf of Mr. Eckman, we would at this time withdraw our former plea of not guilty and enter a plea of guilty as charged in the indictment.

**THE COURT:** All right.

What is the position with respect to Richard O. Dustman?

**MR. WHITE:** Your Honor, at this time we will withdraw our plea of not guilty and enter a plea of guilty as charged.

**THE COURT:** And with respect to William George Olive?

**MR. VanBROCKLIN:** On behalf of the defendant William George Olive, we will withdraw our former plea of not guilty and enter a plea of guilty as charged in the indictment, your Honor.

**THE COURT:** Thank you.

Each of the defendants, through counsel at this time, having withdrawn his former plea of not guilty to the charge contained in the indictment, and each defendant having now entered a plea of guilty, before the Court makes further inquiry pursuant to Rule 11, Mr. Edwards,

do you wish to make a statement on behalf of the Government?

MR. EDWARDS: Yes, your Honor.

It has been agreed between Mr. Mock and myself, Mr. Mock being the attorney for Mr. Eckman, that if Mr. Eckman would enter a plea of guilty to the indictment in this case, that the following sentence would be imposed. Mr. Eckman would be sentenced to a period of two years in the custody of the Attorney General. This sentence would thereafter be suspended and Mr. Eckman would be placed on probation for a period of five years.

If, at the end of two years of this probation, Mr. Eckman has not involved himself in any other criminal activity, the Government would not object to a motion by Mr. Eckman to have his probation terminated at that time.

With respect to both Mr. Dustman and Mr. Olive, the Government would not object to any term of probation that the Court would see fit to propose.

THE COURT: Mr. Mock, do you wish to react to the statement of Mr. Edwards?

MR. MOCK: That is a correct statement, your Honor.

THE COURT: Mr. White, in behalf of Mr. Dustman?

MR. WHITE: That is a correct statement as to Mr. Dustman, your Honor.

THE COURT: Mr. VanBrocklin?

MR. VanBROCKLIN: That is a correct statement as to Mr. Olive, your Honor.

THE COURT: At this time, I will address Mr. Dustman.

What is your plea to the indictment?

DEFENDANT DUSTMAN: Guilty, sir.

THE COURT: It is my understanding from the statement of counsel that it has been agreed by and between the Government and yourself that the Government, in consideration of your plea of guilty, would not oppose a sentence consisting of a period of probation, the imposition of any confinement in prison being suspended and being placed on probation.

Is that your understanding?

DEFENDANT DUSTMAN: Yes, sir.

THE COURT: Have any other promises been made to you other than that?

DEFENDANT DUSTMAN: No, sir.

MR. WHITE: Your Honor?

THE COURT: I'm sorry.

MR. WHITE: Excuse me.

May I make this statement as to Mr. Dustman?

THE COURT: Yes.

MR. WHITE: I believe during the hearing on the motion to suppress that the prosecutor and I were both in error as to the prior record of Mr. Dustman.

Has the Court been made aware of this?

THE COURT: Yes. It has been called to my attention that the record reflects a misdemeanor conviction rather than a felony conviction.

MR. WHITE: That is correct, your Honor.

THE COURT: All right.

Then I further ask you, Mr. Dustman: Did you, on or about the 22nd day of July, 1975 have knowledge that the semi tractor-trailer unit in which you were participating in the painting and making certain alterations thereon did contain a shipment of stolen goods?



DEFENDANT DUSTMAN: Yes, sir.

THE COURT: Thank you.

Mr. Eckman, what is your plea to the indictment?

DEFENDANT ECKMAN: Guilty.

THE COURT: It has been represented in open court by counsel for the Government and your lawyer that an agreement has been reached between yourself and the Government that you will enter a plea of guilty in consideration of the imposition of a sentence of two years' custody of the Attorney General, the execution of which sentence is to be suspended and that you will be placed on probation for a period of five years, and that after the expiration of two years of the probation, if you have not involved yourself in any criminal activity, that the Government would not at that time oppose a motion on your behalf to have your probation terminated at that time.

DEFENDANT ECKMAN: Yes, sir. I understand.

THE COURT: Is that your understanding?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: Do you have any questions about that agreement?

DEFENDANT ECKMAN: No, sir.

THE COURT: Have any other promises been made to you in consideration of your plea of guilty other than that?

DEFENDANT ECKMAN: No, sir.

THE COURT: On the 22nd day of July, 1975, were you present at the premises in — was that New Springfield?

MR. EDWARDS: New Springfield, Ohio, your Honor.

THE COURT: — New Springfield, Ohio where a Snyder trailer unit containing a shipment of cigarettes was situated, and did you know at that time that that vehicle contained stolen goods?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: And did you at that time knowingly have possession of those stolen goods?

DEFENDANT ECKMAN: Yes, sir.

THE COURT: All right. Thank you.

Mr. Olive, what is your plea to the charge in the indictment?

DEFENDANT OLIVE: Guilty.

THE COURT: Do you understand that the agreement that has been reported to me is that in consideration of your plea of guilty, that the Government would not oppose a suspension of the imposition of sentence and placing you on probation for a period of two years?

DEFENDANT OLIVE: Yes.

THE COURT: Do you enter a plea of guilty on that condition?

DEFENDANT OLIVE: Yes, sir.

THE COURT: Do you have any questions about that agreement?

DEFENDANT OLIVE: No, sir.

THE COURT: Were you at the premises in New Springfield, Ohio where the Snyder trailer unit containing a shipment of stolen cigarettes was situated on July 22, 1975?

DEFENDANT OLIVE: Yes, sir.

THE COURT: Did you know that the contents of that trailer unit were stolen?



DEFENDANT OLIVE: Yes.

THE COURT: Did you participate in the possession of those stolen goods at that time?

DEFENDANT OLIVE: Yes.

THE COURT: All right. Thank you.

I am satisfied, based on the inquiry conducted by the Court and based on the statements of counsel for the Government and counsel for the defendants, and each defendant now having personally and through counsel entered a plea of guilty to the charge contained in the indictment, and an agreement having been announced in open court, and the Court having inquired of respective counsel and the parties concerning the agreement, which agreement as to plea and sentencing has been spread on the record of this case in open court, and all the facts and circumstances having been brought to my attention with respect to the background of this offense and the agreements entered into by and between the parties, and the Court will accept the agreement of the parties finding that there is a factual basis for the pleas of guilty and finding that the pleas of guilty are voluntarily entered and that no promises other than those which appear of record have been made. The Court will at this time accept the pleas of guilty of the respective defendants, adjudge each defendant, Richard O. Dustman, James Donald Eckman, and William George Olive, guilty as charged in the indictment.

Having adjudged each defendant guilty on their pleas of guilty, and the Court now being ready to pronounce judgment, do you, Mr. Dustman, do you, Mr. Eckman, or do you, Mr. Olive, have any statements that you wish to make to the Court before sentencing?

DEFENDANT DUSTMAN: No, your Honor.

DEFENDANT OLIVE: No.

DEFENDANT ECKMAN: No, your Honor.

THE COURT: Do counsel have any statements they wish to make?

MR. MOCK: No, your Honor.

Mr. VanBROCKLIN: No, your Honor.

THE COURT: The Court will at this time pronounce judgment.

In accordance with the agreement entered into by and between the parties, Richard O. Dustman, it is the judgment of this Court that imposition of sentence be and is hereby suspended, and you are placed on probation for a period of two years.

William George Olive, it is the judgment of this Court that imposition of sentence be and is hereby suspended, and you are placed on probation for a period of two years.

James Donald Eckman, it is the judgment of this Court that you be committed to the custody of the Attorney General of the United States for a period of two years. The execution of that sentence shall be suspended and you shall be placed on probation for a period of five years with the understanding that if, after the expiration of two years of that probation period, you have not involved yourself in any criminal activity, that the Government will not oppose a motion on your behalf to have your probation period terminated.

Be mindful, however, gentlemen, that with respect to those individuals who received a two-year probationary period, if for any reason the Probation Department is of the view that a longer period of probation is required prior to the expiration of the two-year period, the Probation Department may apply to this Court for an enlargement of that period of time.

That, of course, is not usually the case unless a defendant has presented some problems which indicate some obstacle to a completion of a period of rehabilitation within that period of time.

The judgment of this Court has been pronounced. These cases are now concluded.

I want the respective defendants to fully understand that if they involve themselves in any future criminal activity or conduct themselves in a manner which is in violation of the terms and conditions of probation, that your period of probation can be revoked and sentence imposed.

I trust that each defendant will conduct himself accordingly and comply with the requirements of the Probation Department and the conditions of probation.

If anyone has any questions at this time concerning this sentence, I will be happy to answer them.

MR. MOCK: No questions.

MR. VanBROCKLIN: No questions.

THE COURT: Thank you, gentlemen.

### CERTIFICATE

I, Dennis A. Parise, Official Court Reporter in and for the District Court of the United States for the Northern District of Ohio, Eastern Division, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings herein.

DENNIS A. PARISE

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*Official Court Reporter*